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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN WILLIAM McKELVEY III,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12419

Trial Court Case No. 4FA-14-00040 CR

APPELLANT'S REPLY BRIEF

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APPEAL FROM THE SEPTEMBER 17, 2015 JUDGMENT OF THE SUPERIOR COURT, THE HONORABLE BETHANY HARBISON, PRESIDING

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Filed in the Court of Appeals of the State of Alaska, this 28th day of February, 2018.

Deputy Clerk

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CONSTITUTIONAL PROVISIONS RELIED UPON

Alaska Constitution
§14. Searches and Seizures
The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§22. Right of Privacy
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

United States Constitution
Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARGUMENT

The State's brief is erudite and thoughtful. But the two questions for the Court to answer remain plain and straight forward. Did the police taking photographs of the curtilage of McKelvey's home with a high-powered telephoto-lens camera from an airplane flying above McKelvey's home violate McKelvey's right to privacy under the Fourth Amendment? And did that same police conduct violate McKelvey's right to privacy under Article I, §§14 and 22 of the Alaska Constitution? The answer to both is a simple "Yes."

I. The Fourth Amendment

At page 19 & n.1 of the Brief of Appellee the State asserts that courts have held that the police use of cameras with zoom-lens magnifications similar to that employed in McKelvey's case do not constitute Fourth Amendment searches.[1] Of the numerous cases cited in the treatise referenced by the State, only four appear to involve the police using telephoto lenses from the vantage point of an aircraft,[2] while the remainder involve the police using telephoto lenses from vantage points on a public road or on a neighbor's property.[3] Furthermore, the four cases that do involve the police using a telephoto lens from the airspace overhead are either factually distinguishable from McKelvey's case or poorly reasoned or both.

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[1] See D. Rudstein, C. Erlinder, & S. Thomas, Criminal Constitutional Law, §2.03[2][d] at 2-94 n. 333 (Mathew Bender 2017) (Criminal Constitutional Law).
[2] See United States v. Van Damme, 461, 463 (9th Cir. 1995); United States v. Allen, 675 F. 3d 1373, 1380-81 (9th Cir. 1981); State v. Vogel, 428 N.W. 2d 272, 275-77 (S.D. 1988); State v. Lange, 463 N.W. 2d 390, 395 (Wis. App. 1990).
[3] See Criminal Constitutional Law, §2.03[2][d] at 2-94 n.333

In Lange, the Wisconsin Court of Appeals held that the police use of telephoto lenses of up to 250 mm to make observations of the curtilage from an aircraft overhead did not constitute a Fourth Amendment search.[4] While relying on Ciraolo and Riley as part of the basis for its decision,[5] the Lange court failed to properly appreciate that both Ciraolo and Riley concern and are thus limited to naked-eye observations of the curtilage from the airspace overhead.[6] Instead, the Lange court relied upon a United States Supreme Court precedent involving the use of visual-magnification devices from a non-aerial vantage point.[7]

In Vogel, the South Dakota Supreme Court held the police use of a 35mm camera with a telephoto lens (whose magnification is not indicated) to take photographs of the curtilage from the airspace overhead did not constitute a Fourth Amendment search.[8] Because Vogel was decided after Ciraolo but before Riley, the Vogel court referred to only Ciraolo.[9] Similar to the Lange court, the Vogel court relied upon authority that the use of a visual-magnification device to look into the curtilage from a public vantage point on the ground does not constitute a search.[10]

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[4] See Lange, 463 N.W. 2d at 394-95.
[5] See id.
[6] See Florida v. Riley, 488 U.S. 445, 448-49, 109 S. Ct. 693, 102 L Ed. 2d 835 (1989) (plurality opinion); id., 488 U.S. at 455 (O'Connor, J. concurring in the judgment); California v. Ciraolo, 476 U.S. 207, 213-15 & n.3, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).
[7] See Lange, 463 N.W. 2d at 395 (quoting On Lee v. United States, 343 U.S. 747, 754, 72 S. Ct. 967, 96 L. Ed. 1270 (1952)).
[8] See Vogel, 428 N.W. 2d at 273, 275.
[9] See id. at 275.
[10] See id.

In Allen, the Court held that the police use of a 70mm to 230mm telephoto lens to photograph various vehicles parked on the grounds of the defendant's property, wide tracks leading from the defendant's barn, and the new extension built on the barn from a helicopter overhead did not constitute a Fourth Amendment search.[11] It does not appear that the photographed areas in Allen were determined to be within the curtilage of the property; indeed, the Allen court did not even undertake a curtilage inquiry.[12] In addition, Allen's property was along the Oregon coast where Coast Guard helicopters were well known to routinely patrol the adjoining airspace conducting surveillance aided by sense-enhancing devices.[13] Moreover, Allen predates Ciraolo and thus fails to address the Fourth Amendment issue as framed in McKelvey's case.

The fourth case, Van Damme, succinctly frames the Fourth Amendment issue presented in McKelvey's case. In Van Damme, based on a citizen-informant's tip that Van Damme was growing marijuana in a fenced-off three-greenhouse compound approximately 200 feet from Van Damme's home, law enforcement flew over the greenhouse in a helicopter at more than 500 feet and through the view finder of a 600 mm telephoto lens identified marijuana growing in all three greenhouses.[14] Writing for the Court, Judge Kleinfeld explained that the Court did not need to determine whether the telephoto view from the air violated Van Damme's Fourth Amendment right to privacy because the trial court correctly found that the greenhouses were not within the

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[11] See Allen, 675 F. 2d at 1380-81.
[12] See id.
[13] See id. at 1381.
[14] See Van Damme, 48 F. 3d at 462-63.

curtilage.[15] Because the telephoto lens was technology generally available to the public and was not used to peer into the curtilage, the Court held a Fourth Amendment search did not occur.[16] McKelvey submits then that the use of technology (whether generally available to the public or not) to peer into the curtilage of one's home from the airspace overhead is a Fourth Amendment search and thus requires a warrant.

Even where police are otherwise authorized to intrude into the curtilage, Florida v. Jardines establishes that the purpose of the police intrusion does matter so that police may not intrude into the curtilage if the purpose of the intrusion is to engage in a search or to otherwise take actions not explicitly or implicitly authorized by the homeowner.[17] While Jardines does recognize that law enforcement officers do not need to shield their eyes when in occupying public thorough fares and thus may engage in "visual observation of the home" from pubic airspace, Jardines relies upon the naked-eye observation approved in Ciraolo as the basis for its conclusion.[18] In this context "visual" essentially means "perceptible by the sense of sight."[19] Thus, Jadines implicitly supports the proposition that what is perceived from the air only through the use of technology is indeed a Fourth Amendment search.

The United States Supreme Court's most recent foray into the impact of developing technologies on Fourth Amendment safeguards is Riley v. California where the Court reasoned that the advent of technologies making far more information

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[15] See id. at 463.
[16] See id.
[17] See Florida v. Jardines, 569 U.S. 1, 5-10, 133 S. Ct. 1409, 185 L. Ed 2d 495 (2013).
[18] See Jardines, 569 U.S. at 7 (quoting Ciraolo, 476 U.S. at 213).
[19] www.dictionary.com/browse.visual.

accessible to the police "does not make the information any less worthy of the protection for which the Founders fought."[20] The Court correspondingly held that searches of a person's cell phone are presumptively unreasonable unless conducted under the auspices of a search warrant.[21] As one commentator has explained:

> The principle of *Riley* is simple and logical: new technologies that augment the government's surveillance abilities justify changing or, at the very least, expanding existing Fourth Amendment doctrines to apply new circumstances to these new technologies.
>
> Such an expansion could be done with the aerial surveillance doctrine of *Ciraolo*. Therefore the doctrine expressed in *Ciraolo* should be expanded to differentiate between aerial surveillance seen by the naked eye with the surveillance observed via other technologies. This would not only be consistent with *Ciraolo*, but would build upon circumstances highlighted by the Court as key in adjudicating the case.[22]

II. Article I, §§ 14 and 22 Of The Alaska Constitution

At pages 30 and 35-36 of the Brief of Appellee, the State relies on the Alaska Supreme Court's decision in Cowles[23] to assert that McKelvey's expectation of privacy is not a reasonable one under Article I, §§ 14 and 22 of the Alaska Constitution. To the contrary, Cowles is distinguishable from McKelvey's case and accordingly controls the Alaska constitutional analysis in McKelvey's favor. Unlike Cowles who worked in a public office space where co-workers and passersby could observe her every

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[20] Riley v. California, ___ U.S.___, ___, 134 S. Ct. 2473, 2495, 189 L. Ed. 2d 430 (2014).
[21] See id., 134 S. Ct. at 2493.
[22] J. Laperruque, "Preventing An Air Panopticon: A Proposal For Reasonable Legal Restrictions On Aerial Surveillance," 51 U. Rich. L Rev. 705, 723 (2017) ("Preventing An Air Panopticon").
[23] Cowles v. State, 23 P.3d 1168 (Alaska 2001).

activity so that she had no reasonable expectation of privacy against the technology observing her from the ceiling overhead,[24] McKelvey's case concerns the curtilage of his home -- the place where one's expectation of privacy is at its highest, the "first among equals"[25] -- so that McKelvey has every reasonable expectation of privacy against the technology peering into his curtilage from the airspace overhead.

One can choose the location of his or her property so as to minimize the ability of prying neighbors to observe one's curtilage; hence cases approving the use of viewing devices to observe the curtilage from points on neighbors' properties.[26] But there is no escaping the prying eye in a plane overhead. When that eye is just a naked one, there is an inherent limitation on the ability to intrude upon one's privacy. When that eye is allowed to be enhanced by or replaced by technology, even the castle on the hilltop becomes a fancy fishbowl. One generation's telephoto lens is the next generation's drone. And what will the coming generations bring? Without meaningful constraints to curtail the warrantless use of technology in the airspace overhead, privacy will become but a word we use, spoken but not honored.

McKelvey's concerns are shared by the author of "Preventing An Air Panopticon." With drones bursting onto the scene and photo zoom and resolution technologies evolving at an exponential rate, we face the annihilation of privacy if we do not subject

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[24] See Cowles, 23 P.3d at 1171-73.
[25] Jardines, 569 U.S. at 6; see id. at 6-7.
[26] See Criminal Constitutional Law, §2.03 [2][d] at 2-94 n. 333.

the aerial use of drones and other photo technologies to the warrant requirement.[27] As the author explains:

> Aerial surveillances possesses a number of unique features that create distinct risks to privacy as compared to other forms of government surveillance. First, aerial surveillance occurs from a vantage point that can view private property on a much larger scale than any form of traditional ground-level surveillance, more easily overcoming civilians' deliberate efforts to conceal private property. Second, aerial surveillance is mobile, presenting the ability to follow moving targets and easily redirect efforts to different targets in a way that stationary cameras, such as police "Blue Light" cameras and traffic cameras cannot. This enhanced mobility is augmented by the openness of airspace, giving aerial surveillance a higher degree of mobility than ground-level officers and vehicles, which are restrained by obstructions. Third, aerial surveillance is inconspicuous. Whereas individuals can regularly notice and develop comprehensive mapping of Blue Light cameras or even beat cops, aerial surveillance is a true panopticon, able to observe anywhere at any time without any notice or warning to those being monitored. Fourth, aerial surveillance can target a wide field, providing the ability to expand access and retain capabilities. While the ability to immediately monitor any point in a city requires an enormous allocation of manpower and technology, aerial surveillance encompasses an incredibly wide field of view with the capability to rapidly hone in on any area within it at a moment's notice.[28]

The author of "Preventing An Air Panopticon" then proposes the "Naked Eye Rule" to govern aerial surveillance by law enforcement:

> Here, the "Naked Eye Rule" would build upon *Ciraolo* in the following manner: *aerial surveillance cannot be used by law enforcement absent court approval, unless the surveillance is akin to the naked eye view of a human on the aircraft.* This would have two practical restrictions: first, it would limit unregulated aerial surveillance observations to those obtained at human eye resolution; and second, it would prohibit unregulated use of

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[27] See "Preventing An Air Panopticon," 51 U. Rich. L. Rev. at 705-13.

[28] Id. at 714-15 (footnotes and citations omitted); see also "Anchorage Police Want to Start Using Drones," https://www.adn.com/alaska-news/anchorage/2017/11/15/anchorage-police-want-to-start-using-drones/.

> drones, and any observation that cannot be made by a human on an aircraft.[29]

McKelvey agrees that the Naked Eye Rule is required under Article I, §§14 and 22 of the Alaska Constitution. For McKelvey to then prevail, the Court need go only so far as to apply it to the curtilage of McKelvey's home.

The State nonetheless makes several arguments to avoid or dilute the Naked Eye Rule as it would apply in McKelvey's case. For one, the State argues at pages 30-31 of the Brief of Appellee that potential difficulties in determining what is and what is not curtilage counsel against drawing a line of aerial privacy at the curtilage. But determining the boundaries of the curtilage in any given case is necessarily a fact-intensive inquiry that courts and hence police must makes regardless of whether the intrusion comes from the airspace above or occurs on the ground below.[30] That there may be some uncertainty as to how far the curtilage extends in a given case should counsel law enforcement to err on the side of caution and to thus resolve any doubt on the side of seeking a warrant.

The State also proposes at pages 42 through 44 of its brief that aerial surveillance be limited only under the auspices of trespass law. But the protections of privacy embedded in Article I, §§ 14 and 22 of the Alaska Constitution are not concerned merely with trespass or other aspects of the common law. Still, if police conduct "constitutes an invasion of a common law right to privacy, such conduct obviously violates an expressed

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[29] "Preventing An Air Panopticon," 51 U. Rich. L. Rev. at 724 (italics in original).

[30] See Van Damme, 48 F.3d at 462-65; see also Jardines, 569 U.S. at 7 ("While the boundaries of the curtilage are generally clearly marked, the conception defining the curtilage is at any rate familiar enough that it is easily understood from our daily experience.") (quotation and citation omitted).

constitutional declaration of the right."[31] In this regard the Alaska Supreme Court has recognized that the Alaskans are entitled to the common law "right to be free from harassment and constant intrusion into one's daily affairs."[32] The Wal-Mart Court confirmed that such a right is delineated in the Restatement (Second) of Torts which states: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[33] Offensive intrusion requires "either an unreasonable manner of intrusion, or intrusion for an unwarranted purpose."[34] The warrantless, technology-enhanced police peering into McKelvey's curtilage from the airspace overhead is offensive in both its manner and its purpose, thus violating McKelvey's right to privacy under the Alaska Constitution.[35]

At pages 44 and 45 of the Brief of Appellee, the State concludes by relying upon the Alaska Supreme Court's decision in Beltz[36] for the proposition that this Court should allow warrantless aerial surveillance based merely upon reasonable suspicion. Beltz, however, concerned one's reasonable expectation of privacy in garbage placed outside the boundaries of the curtilage; the Court there did recognize some reasonable expectation of privacy in that circumstance and thus applied a reasonable-suspicion requirement under the Alaska Constitution, in contrast to the United States Supreme Court's determination

[31] State v. Glass, 583 P.2d 872, 881 (Alaska 1978).
[32] Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 632 (Alaska 1999).
[33] Id. (quoting Restatement (Second) of Torts §652B (1997)) (emphasis added).
[34] Id. (quotation and citation omitted).
[35] See Glass, 583 P.2d at 881.
[36] Beltz v. State, 221 P.3d 328 (Alaska 2009).

that there is no Fourth Amendment privacy interest in such cases.[37] Even applying the reasoning of Beltz then to the technology-enhanced aerial surveillance which occurred in McKelvey's case, the police would have needed the requisite reasonable suspicion in regard to areas outside McKelvey's curtilage but would still have needed to obtain a warrant prior to peering into his curtiliage from the airspace overhead.

Finally, McKelvey would note that after the State filed its brief in this case, the Hawaii Supreme Court rendered its decision in the Quiday case. The Hawaii Supreme Court adopted the rule established by the California Supreme Court in Cook[38] and held that "an individual has a reasonable expectation of privacy from government aerial surveillance of his or her curtilage and residence, when such aerial surveillance is conducted with the purpose of detecting criminal activity therein."[39] "Such purposeful aerial surveillance of an individual's residence and curtilage" constitutes a search under the Hawaii Constitution.[40] This Court should hold the same under the Alaska Constitution and thus require the police to obtain a warrant whenever they decide to peer -- with their eyes or their technologies -- into one's curtilage from the airspace overhead for the purpose of detecting criminal activity (as well as whenever they employ their technologies to peer into one's curtilage from the airspace overhead for any or no purpose at all).

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[37] See Beltz, 221 P.3d at 332-39.
[38] People v. Cook, 710 P.2d 299, 221 Cal. Rptr. 499 (Cal. 1985).
[39] State v. Quiday, 405 P.3d 552, 562 (Hawaii 2017).
[40] Id.

CONCLUSION

As the trial court concluded, the evidence presented in support of the search warrant at issue does not establish probable cause without the evidence the police obtained via the taking of photographs with a high-powered telephoto-lens camera while flying above McKelvey's property. Even if there were sufficient evidence of probable cause without the flyover evidence, the warrant is nonetheless invalid because the flyover evidence prompted the police to seek the warrant.

For the reasons stated, the decisions of the trial court should be reversed. McKelvey's convictions must thus be vacated and the charges against him must be dismissed. John William McKelvey III respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 5th day of February, 2018.

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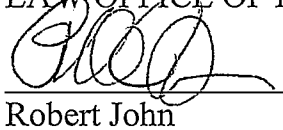

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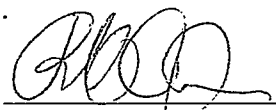

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